No. 49604-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ODYSSEY-GERONIMO JV,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF TRANSPORTATION,

Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COUNTY
THE HONORABLE ANNE HIRSCH

REPLY BRIEF OF APPELLANT

SMITH GOODFRIEND, P.S.

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I. INTRODUCTION

Respondent Washington State Department of Transportation ignores the well-established principle that a court *must* consider extrinsic evidence when interpreting a contract, regardless of whether it is "incorporated" into the contract or whether the contract language is ambiguous. The trial court thus erred in refusing to consider the usage and standard of the painting industry when interpreting the contract between WSDOT and appellant Odyssey-Geronimo JV. That industry standard treats voids between closely fabricated steel members as solid when calculating the "surface area of structural steel to be painted."

WSDOT further ignores the clear language in OGJV's claim alleging that WSDOT miscalculated the surface area of the bridge irrespective of the voids, as well as WSDOT's responsible employees' concessions that WSDOT's own calculations were erroneous. This Court should reverse the trial court's summary judgment, and hold that WSDOT breached the contract as a matter of law. Even should this Court affirm the summary judgment, it should nonetheless reverse the trial court's $374,689.04 judgment for attorney fees and costs as unsupported by the requisite specific findings and because the award includes unauthorized expert witness expenses.

II. REPLY ARGUMENT

A. The trial court erred in failing to consider the painting industry standard for calculating surface area.

WSDOT fundamentally confuses the law governing interpretation of a contract. Because a jury would have been free to adopt differing inferences from the extrinsic evidence, the trial court's summary judgment order must be reversed.

Under Washington law, the "[i]ntent of the contracting parties *cannot* be interpreted without examining the context surrounding an instrument's execution," including industry standards. *Kelley v. Tonda*, 198 Wn. App. 303, 312, ¶ 13, 393 P.3d 824 (2017) (emphasis added) (citing *Berg v. Hudesman,* 115 Wn.2d 657, 668, 801 P.2d 222 (1990)). Since *Berg,* Washington law has required *all* contracts to be interpreted in light of extrinsic evidence. The trial court plainly erred in refusing to consider extrinsic evidence on the basis that "there needs to be a clear and unequivocal incorporation by reference" and because "the contract does not say 'incorporating the industry standards.'" (9/23 RP 51) WSDOT's attempt to support the trial court's flawed reasoning is unsupported by any authority.

Further, WSDOT ignores the evidence of the industry standard before the trial court on summary judgment. (Resp. Br. 26-27)

WSDOT focuses solely on whether the contract "incorporated" a publication from the Painting and Decorating Contractors of America (PDCA) stating "[c]losely fabricated items, such as . . . open web joists . . . should be measured as being solid." (CP 219) However, OGJV also submitted expert testimony explaining that "[f]or built-up members with lattice bars or perforated plates, the openings are disregarded and the area is calculated as being solid." (CP 303-06) OGJV's expert also disagreed with WSDOT's assertion that the PDCA's language would not apply to the bridge's lattice structural framework (Resp. Br. 31-32), underscoring a jury must resolve disputed issues of fact to properly interpret the parties' contract. (CP 305-06)

As WSDOT acknowledged below, "OGJV is a joint venture made up of two experienced painting contractors," whose knowledge of industry standards similarly presented relevant extrinsic evidence that the trial court failed to consider. (CP 37; *see also* CP 7 (complaint: "[t]hese industry standards have been followed on literally every other bridge painting project in Odyssey's and Geronimo's decades of prior work.")) The PDCA publication simply confirms what two experienced painting contractors repeatedly told WSDOT – voids should be treated as solid when calculating surface area between closely fabricated steel members. (*See* CP 105-06, 140-41, 748-49)

WSDOT's argument that the contract is unambiguous has no bearing on the role of extrinsic evidence in contract interpretation. (Resp. Br. 24-25) "There is no requirement that an agreement be ambiguous before evidence of a usage of trade can be shown, nor is it required that the usage of trade be consistent with the meaning the agreement would have apart from the usage." Restatement (Second) of Contracts § 222, comment b (1981); *Kelley*, 198 Wn. App. at 312, ¶ 13.[1] Nor was OGJV required to "clarify" whether WSDOT understood Washington law requires industry standards to be considered or to make sure WSDOT "knew" of the industry standard. (Resp. Br. 1, 35) *See Bremerton Concrete Prod. Co., Inc. v. Miller*, 49 Wn. App. 806, 810, 745 P.2d 1338 (1987) (rejecting "argument that industry standards are not binding if a party is unaware of them").

WSDOT's attempt to support the trial court's interpretation of "unambiguous" contract language also ignores that "surface area" is a term of art within the painting industry and thus must be interpreted in light of industry standards, even if its meaning might be plain outside the industry. *Gorre v. City of Tacoma*, 184 Wn.2d

[1] WSDOT's reliance on the ruling of the Disputes Review Board (Resp. Br. 35) is thus mistaken. The Board made the same mistake WSDOT does, rejecting the evidence of industry standard because the contract is purportedly "not ambiguous." (CP 136)

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30, 37, ¶ 14, 357 P.3d 625 (2015) ("ordinary definition" of "Respiratory disease" was not dispositive because it "has a unique meaning in the medical community"); *State v. Veliz*, 176 Wn.2d 849, 854, ¶ 10, 298 P.3d 75 (2013) ("when a technical term or term of art is used, we turn to the technical definition of a term of art even where a common definition is available") (quotation and alteration omitted). WSDOT's heavy reliance on the contract language "surface area of structural steel to be painted" (Resp. Br. 25) only emphasizes that "surface area" has a specific meaning in the painting industry and that the trial court erred in categorically rejecting evidence of that meaning. Moreover, as OGJV explained to the Disputes Review Board, "to be painted" referred only to the fact that certain portions of the bridge were not to be painted – not that WSDOT had adopted a definition of "surface area" wholly inconsistent with industry standards. (CP 125)

In order to avoid confronting the extrinsic evidence supporting OGJV's contract interpretation, WSDOT erroneously argues this case involves "construction" – a legal issue – and not "interpretation" of the contract – a factual question of intent. Industry standards are evidence of intent, and thus are relevant to interpretation of the contract. *Kelley*, at 312, ¶ 13. "[I]nterpretation

[is] a process in which the parties' *intent* is ascertained through the admission of extrinsic evidence, and construction [is] a process by which legal consequences are made to follow from the terms of the contract." *Burgeson v. Columbia Producers, Inc.*, 60 Wn. App. 363, 366, 803 P.2d 838, *rev. denied,* 116 Wn.2d 1033 (1991) (emphasis added) (Resp. Br. 24). Unlike *Burgeson*, where the parties had "no evidence as to their intent" when they signed a lease, 60 Wn. App. at 367, here the substantial evidence of industry standard and custom went directly to the issue of intent. The trial court simply ignored that contractual intent in this case was an issue of fact that should not have been resolved on summary judgment.

With no law to support its position and after ignoring the disputed facts, WSDOT asserts that OGJV did not argue below the contract must be interpreted in light of painting industry standards. That assertion is also baseless. (Resp. Br. 23) OGJV repeatedly argued that the extrinsic evidence created an issue of fact for a jury. (CP 282 ("An industry standard is certainly not something that this Court can determine as a matter of law, as it requires testimony and evidence from members of the industry (including expert witnesses)."); CP 283 ("the determination of an 'industry standard' is to be left to a fact-finder to determine based on the testimony of

fact and expert witnesses in the industry, and not appropriately resolved through summary judgment."); *see also* CP 285-86) OGJV made clear this was true regardless of whether the contract "incorporated" the PDCA standard. (9/23 RP 30-31 ("If the SSPC and PDCA weren't even mentioned anywhere in the contract, nothing about this case would change. Contractors pursue claims . . . without having to reference contract provisions on incorporated standards. . . . We have submitted that fact and expert evidence demonstrating that there is an issue of fact"))

OGJV is not "seek[ing] to add" terms to the contract (Resp. Br. 1) or asking this Court to "simply assume" the industry standard is part of the contract. (Resp. Br. 35) OGJV is asking only that, as Washington law requires, the intent of the parties be determined in light of the painting industry standard to treat voids as solid when calculating surface area. That determination is for a jury, not the trial court on summary judgment.

B. OGJV did not "waive" any of its claims, as the language of its certified claim proves.

OGJV asserted in its certified claim that WSDOT miscalculated the "actual" surface area of the bridge in its change order. WSDOT repeatedly misrepresents OGJV's certified claim, selectively quoting its language to support the trial court's erroneous

ruling that OGJV waived all grounds for its claim save for WSDOT's miscalculation of the surface area of structural steel to be painted.

Contractual notice procedures provide an opportunity to resolve claims before they are brought to court by requiring the plaintiff to explain the specific basis for a claim and precluding lawsuits based on "general notice . . . that [the plaintiff] expect[s] additional compensation." *Mike M. Johnson, Inc. v. County of Spokane*, 150 Wn.2d 375, 390, 78 P.3d 161 (2003). OGJV fully complied with the protest and claim procedures in the contract, thus allowing WSDOT to resolve this dispute before it went to litigation. (Resp. Br. 12-19)

In its claim, OGJV asserted that even accepting WSDOT's definition of surface area it was entitled to additional compensation because 1) "WSDOT's recalculation also contains omission and summation errors," *e.g.*, excluding entire portions of the bridge, and 2) "due to arbitrary deductions, the amount compensated in [change order #8] is actually lower" than the amount WSDOT asserted OGJV should be paid in that change order. (CP 141-42) OGJV specifically disputed WSDOT's conclusion that "the completed quantity was 10.7% more surface area than advertised . . . . [and] that OGJV has been equitably compensated per [the change order]." (CP 140)

WSDOT *nowhere* addresses this language in OGJV's claim, simply pretending it does not exist.

By arguing that WSDOT's erroneous calculation of "actual" surface area had no bearing on whether surface area should be calculated consistent with industry standards, OGJV did not dismiss WSDOT's calculations of "actual" surface area as "irrelevant" to all of its claims, as WSDOT alleges (Resp. Br. 10, 16, 18). OGJV instead told WSDOT that its other claims were made "[n]otwithstanding our rejection of WSDOT's methodology" that conflicted with industry standards. (CP 749) WSDOT likewise misrepresents OGJV's claim in alleging the contract provisions identified by OGJV relate only to the definition of surface area. (Resp. Br. 15) OGJV identified the provision relating to the "quantity of Work." (CP 140) That provision applies not just to the voids issue, but to all of OGJV's claims, which allege that WSDOT's basic math errors deprived OGJV of compensation earned for the quantity of work it actually performed.

OGJV's protest letter also asserted that WSDOT had erred in its calculation of "actual" surface area. Like its certified claim, OGJV's protest letter alleged "WSDOT's latest calculations seem to be missing members and portions of members, which would accumulate to a significant quantity of area," criticizing the results of

WSDOT's six-month effort to calculate "actual/exact surface area" as "incomplete, not actual, not exact." (CP 749)[2]

WSDOT does not refute that its steadfast refusal to provide the information underlying its calculations of "actual" surface area prevented OGJV from making detailed challenges to that calculation. (App. Br. 23-24) Thus, even had OGJV somehow failed to adequately raise its claims, any deficiency was caused by WSDOT's intransigence, which cannot bar OGJV's right to contest its calculation in court. *Weber Const., Inc. v. Cty. of Spokane*, 124 Wn. App. 29, 34-35, 98 P.3d 60 (2004), *rev. denied*, 154 Wn.2d 1006 (2005) (App. Br. 24). WSDOT now criticizes OGJV for not providing alternate damage calculations for its other claims (Resp. Br. 17), again ignoring that, as OGJV explained, it could not provide those calculations because "there . . . is not enough information to perform a complete and reliable review of WSDOT's latest surface area calculations" despite OGJV "request[ing] additional detailed information." (CP 749)

[2] OGJV's protest letter did not address calculation of the change order because it had not been issued yet. (CP 745-50 (June and October 2014 protest letters sent before November 2014 change order))

OGJV rightly pointed out that when WSDOT solicited funds from the Legislature it used a calculation of surface area 200,000 square feet higher than the one it told OGJV to "use as a guide in determining the amount of preparation and paint involved." (App. Br. 18; CP 79) OGJV cited that higher calculation to show that despite knowing its published calculation was inaccurate WSDOT nevertheless told bidders to use it "as a guide," not to show that WSDOT had previously performed calculations that included voids, as WSDOT alleges. (Resp. Br. 21) OGJV made the same argument in its claim, citing another – even higher – pre-bid calculation, stating "[i]t is clear that WSDOT had multiple surface area quantities in their Pre-Bid Takeoff, and they chose to provide the lowest value to OGJV and other bidders." (CP 141, 145-50)[3] It is for a jury to decide whether WSDOT's own conflicting calculations of surface area support OGJV's claims that WSDOT miscalculated the surface area of the bridge.

[3] OGJV did not perform its own calculation before bidding (Resp. Br. 5) because WSDOT instructed OGJV to use its own calculation. (CP 79) As OGJV's Project Director explained, the deviation between WSDOT's published surface area and a later calculation performed by OGJV "just wasn't on my radar" because "[w]e were solving other problems." (CP 772)

OGJV is entitled to be paid for the work it actually performed, as the contract itself states: "[p]ayment will be made on the basis of the actual quantities of each item of Work completed in accordance with the Contract requirements." (CP 49) WSDOT's contention that this language is inapplicable because the disputed items were bid as "lump sum" conflicts not only with the language of the contract, but its own employees' objectively manifested understanding of the contract. (Resp. Br. 36-37) Under the contract, OGJV was entitled to request an equitable adjustment and if, as here, the parties could not agree on the amount of that adjustment, the price was to be determined by using "[u]nit prices." (CP 54) Indeed, that is exactly what WSDOT's change order did, though WSDOT (again) miscalculated the square footage. WSDOT's engineer confirmed as much, stating "for the pay items in question for the bridge painting . . . OGJV should be paid based upon . . . the actual quantity for each item of work." (CP 367-68) The DRB likewise agreed, recommending "the 10.7% increase in quantity would result in a 10.7% increase i[n] the lump sum prices for both Bid Items 3 and 7." (CP 137)

"It is the responsibility of the moving party to raise in its summary judgment motion all of the issues on which it believes it is entitled to summary judgment." *White v. Kent Med. Ctr., Inc., P.S.*,

61 Wn. App. 163, 168, 810 P.2d 4 (1991) (App. Br. 25). WSDOT concedes that it first raised its claim preservation argument in its summary judgment reply (Resp. Br. 22), arguing it did not thereby waive that argument because WSDOT had no way of knowing that OGJV would point out that its other claims were not at issue in WSDOT's motion for summary judgment. But that argument again ignores the language in OGJV's certified claim stating WSDOT had erred in calculating "actual" surface area and the change order. (CP 141-42) If WSDOT believed OGJV had failed to preserve its other claims, it was incumbent on WSDOT to argue that in its motion, not sandbag OGJV by waiting to address it on reply.

This "entire case" has *not* been about voids. (Resp. Br. 19) OGJV has consistently alleged that WSDOT committed basic math errors in both its calculation of "actual" surface area and its change order. Even should this Court accept WSDOT's contention that "the surface area of structural steel to be painted" does not include open spaces between closely fabricated steel components, it should nonetheless reverse and remand for resolution of OGJV's claims for additional compensation for the work it actually performed.

C. This Court should grant OGJV partial summary judgment given WSDOT's undisputed misrepresentation of surface area.

Regardless of this Court's ruling on the voids issue, WSDOT has breached the contract as a matter of law by misrepresenting the surface area of the bridge, as its employees conceded. (App. Br. 25-28) This Court should remand for a jury trial limited to whether the parties intend the contract to include voids based on all extrinsic evidence and to assess OGJV's damages for its uncompensated work arising from WSDOT's misrepresentation of surface area.

WSDOT's arguments about whether its employees are speaking agents capable of making party-opponent admissions under ER 801(d)(2) misses the point. (Resp. Br. 38-39) Even if its employees do not have formal speaking authority under ER 801(d)(2) "to concede legal liability" (Resp. Br. 38), their factual concessions that WSDOT's calculation of "actual" surface area excluded entire portions of the bridge are the type of factual matters well within the authority of the two WSDOT employees who quantified the surface area using a CAD program. (CP 506, 517) *See Donald B. Murphy Contractors, Inc. v. State*, 40 Wn. App. 98, 109-10, 696 P.2d 1270 (employees could not commit State to pay indirect

costs attributable to change and stop work orders), *rev. denied*, 103 Wn.2d 1039 (1985) (Resp. Br. 39).

The employees' testimony confirms that WSDOT erred in its calculations. (CP 509-11, 517-18 (conceding calculations omitted portions of bridge)) The only question that remains is the extent of that error. OGJV is entitled to partial summary judgment on liability.

D. The Court should reverse the award of attorney and paralegal fees, which are not supported by authority or the requisite findings.

1. WSDOT cites no authority allowing expanded costs under RCW 39.04.240.

The trial court's award of attorney's fees and costs rests on its erroneous summary judgment order. If that order is reversed, the fee and cost award must also be reversed. Even should this Court affirm the summary judgment order, WSDOT has not cited *any* authority to support the trial court's award of WSDOT expert witness fees.

Washington follows the "American Rule" that "each party in a civil action will pay its own attorney fees and costs." *Berryman v. Metcalf*, 177 Wn. App. 644, 656, ¶ 24, 312 P.3d 745 (2013), *rev. denied*, 179 Wn.2d 1026 (2014). That rule applies to expert expenses: "The American rule states fees and expenses are not recoverable absent specific statutory authority, contractual provision, or recognized grounds in equity." *Wagner v. Foote*, 128 Wn.2d 408, 416,

908 P.2d 884 (1996) (expert accountant fees).[4] "Where an expert is employed and is acting for one of the parties, it is not proper to charge the allowance of fees for such expert against the losing party." *State v. Mandatory Poster Agency, Inc.*, __ Wn. App. __, 2017 WL 2839781, at *11 (July 03, 2017) (quotation and alteration omitted).

Under the American Rule, it is WSDOT's burden to establish an affirmative basis for the trial court's award, not OGJV's burden to disprove one. WSDOT flips this law on its head, attempting to support the trial court's expert witness fee award by arguing that "OGJV has pointed to no cases . . . under RCW 39.04.240 and RCW 4.84.250" that disallow such expanded costs. (Resp. Br. 42-43)

WSDOT does not and cannot meet its burden. Despite conceding this is "a matter of statutory construction" (Resp. Br. 41), WSDOT cites no language from RCW 39.04.240, or RCW 4.84.250-280 authorizing an award of expanded costs, nor does it cite any cases interpreting those statutes. That courts have awarded expanded costs in other types of litigation "[i]n multiple *other* classes

[4] WSDOT fails to distinguish *Wagner*. (Resp. Br. 41) *Wagner* was not, as WSDOT contends, limited to interpreting RCW 4.84.030, but held that where, as here, a party fails to identify a basis for a cost award, the court must deny it. *Wagner*, 128 Wn.2d at 418 ("whether Mr. Pirkle's fees are characterized as expert witness fees or accountant fees, the court may not award them as costs or damages absent specific statutory, contractual, or recognized equitable grounds. . . . [n]o such grounds exist").

of litigation" (Resp. Br. 41 (emphasis added)) does nothing to support WSDOT's claim in *this* litigation.

Those "other cases of litigation" contain specific authority for expanded cost recovery. Contrary to WSDOT's claim that "there is no textual basis in [the Law Against Discrimination] statute for such recovery" (Resp. Br. 42), expert witness fees are recoverable because of specific language in RCW 49.60.030(2) that specifically incorporates the cost recovery provision of § 2000e-5(k) of the United States Civil Rights Act of 1964, which allows "a reasonable attorney's fee (including expert fees) as part of the costs."

In the insurance context, the Washington Supreme Court adopted an equitable exception to the American Rule based on the unique relationship between insurers and insureds. *Panorama Vill. Condo. Owners Ass'n Bd. of Directors v. Allstate Ins. Co.*, 144 Wn.2d 130, 26 P.3d 910 (2001) (Resp. Br. 42). Indeed, WSDOT acknowledges that *Panorama* applied an "equitable rationale" (Resp. Br. 42), but makes no argument that a large state agency is at all similar to disadvantaged insureds who must sue to obtain the benefits of the insurance they purchased. *See Panorama*, 144 Wn.2d at 144 ("It is the purpose of the *Olympic Steamship* exception to

make an insured whole when he is forced to bring a lawsuit to obtain the benefit of his bargain with an insurer.").

WSDOT's argument that RCW 4.84.190 authorized the expert witness fee award is devoid of textual support. (Resp. Br. 42) RCW 4.84.190 grants the court discretion to award costs "[i]n all actions and proceedings *other than those mentioned in this chapter* [and RCW 4.48.100], where no provision is made for the recovery of costs . . . ."[5] But WSDOT concedes that RCW 4.84.250 applies to this litigation through its incorporation into RCW 39.04.240. (Resp. Br. 41 (stating RCW 4.84.250 is "applicable here because of its reference in RCW 39.04.240")) And even if RCW 4.84.250-.280 did not apply to this action, this was a "civil action for the recovery of money only" within the scope of RCW 4.84.015(1).

Even should this court affirm summary judgment, it should reverse the $76,797.05 in expert witness fees awarded to WSDOT, which was not authorized by any statute, contract, or recognized equitable basis.

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[5] RCW 4.84.190 "is principally relied on in equity cases." Tegland, 14A *Wash. Pract.* § 36.11 at 614-15 (2nd ed. 2009).

2. The trial court erred in awarding WSDOT over $260,000 in attorney and paralegal fees without finding the fees were reasonable.

WSDOT likewise fails to provide a compelling defense of the trial court's award of $212,775 in attorney's fees and over $50,000 in paralegal fees. At a minimum, this Court should remand to the trial court for reconsideration of its fee award based on the required findings of fact and conclusions of law.

"[M]eaningful findings and conclusions must be entered to explain an award of attorney fees." *Berryman*, 177 Wn. App. at 677, ¶ 79. The findings must be more than conclusory. *Berryman*, 177 Wn. App. at 658, ¶ 29. "The burden of demonstrating that a fee is reasonable is upon the fee applicant" and a trial court commits reversible error by failing to address specific objections that time billed was duplicative or unnecessary. *Berryman*, 177 Wn. App. at 657-59, ¶¶ 25, 31.

Here, the trial court failed to enter the required findings and WSDOT failed to meet its burden of demonstrating that its fees were reasonable. (App. Br. 34-38) Recognizing that the trial court's written findings are insufficient to explain why its $265,000 award was reasonable and did not include duplicative or unproductive work, WSDOT relies on the trial court's equally conclusory oral

statement. (Resp. Br. 43, quoting 12/9 RP 21: "[c]ertain of the fee requests are reasonable and appropriately documented, and there are some that I don't think are appropriately documented.") *See Berryman*, 177 Wn. App. at 657, ¶ 26 (trial court abused discretion by "simply [finding] that the hourly rate and hours billed were reasonable."). The trial court did not perform a "particularized inspection" (Resp. Br. 44), but instead made a blanket reduction because WSDOT purported to document over 1,000 hours in attorney's fees well after that work was done and then stated – without any analysis or explanation – that the remaining fees were reasonable. (CP 1007)

The federal cases cited by WSDOT (Resp. Br. 46) do not impose a lesser burden on a government agency to demonstrate the reasonableness of its attorney fees, and in any event are not binding on a Washington court given this state's distinct requirement to support a fee award with specific findings. *See Taliesen Corp. v. Razore Land Co.*, 135 Wn. App. 106, 121, ¶ 33, 144 P.3d 1185 (2006). Moreover, in each of those federal cases, the agency provided proof that its fees were reasonable or the objections were meritless. *United States v. Gurley*, 43 F.3d 1188, 1199-1200 (8th Cir. 1994) (rejecting objection that party could not be required to pay for costs of

identifying potentially responsible parties under CERCLA), *cert. denied*, 516 U.S. 817 (1995); *United States v. E.I. du Pont de Nemours & Co., Inc.*, 341 F. Supp. 2d 215, 245 (W.D.N.Y. 2004) (awarding DOJ fees for enforcement based on documentary evidence, including time records and travel vouchers, that were supported by expert accounting testimony); *United States v. Northernaire Plating Co.*, 685 F. Supp. 1410, 1417 (W.D. Mich. 1988) (stating, without further explanation, that government's fees and costs were "documented in exhibits"), *aff'd sub nom.* 889 F.2d 1497 (6th Cir. 1989), *cert. denied*, 494 U.S. 1057 (1990).[6]

WSDOT's arguments confirm the trial court abused its discretion. WSDOT cites *no evidence* to support its assertion that its "hourly billing records . . . were . . . created contemporaneously with the work performed" (Resp. Br. 45), and concedes elsewhere its "detailed descriptions were not contemporaneously made." (Resp. Br. 2; *see also* 2/3 RP 21 (trial court: "The State really should have known from the get go that if it was going to be asking for attorney's fees that it should keep contemporaneous records")) WSDOT also argues that it was not required to submit supporting documentation

[6] *Northernaire*, contrary to Washington law, placed the burden on the defendant to refute the fees, awarding them because "Defendant has not presented any evidence . . . ." 685 F. Supp. at 1417-18.

for one of its attorneys, arguing that documentation would have been "repetitive at best." (Resp. Br. 48 n.6) WSDOT thus concedes, as OGJV argued, this billing was duplicative. (App. Br. 36-37) WSDOT also concedes that its "detailed" descriptions of its time is in the form of weekly and even *monthly* summaries. (Resp. Br. 48)

WSDOT's defense of the trial court's award of paralegal fees is likewise meritless. WSDOT has no response to OGJV's objection that WSDOT received paralegal fees for non-legal work, completely ignoring the specifically identified entries in OGJV's opening brief. (Resp. Br. 48-49; *see* App. Br. 37-38 (citing CP 887, 935, 937-38) *Berryman*, 177 Wn. App. at 658-59 (trial court erred in failing to address "very specific objections that certain blocks of time billed were duplicative or unnecessary"). Indeed, the case relied on by WSDOT confirms the impropriety of this fee award, reversing an award of paralegal fees to the State because its declarations "do not specify how the services performed were legal in nature." *Mandatory Poster* Agency, 2017 WL 2839781, at *10.

Should this Court reverse the grant of summary judgment any issues concerning WSDOT's fees become moot. However, should this Court affirm summary judgment, it should nonetheless reverse the trial court's award of fees and remand for the required findings,

instructing the trial court to limit WSDOT's attorney's fees to those reasonably supported by documentation and to limit paralegal fees to those for work that otherwise would be performed by a lawyer.

III. CONCLUSION

The trial court erred in ignoring OGJV's extrinsic evidence when interpreting the contract. It further erred in holding that OGJV did not preserve its other claims, in failing to hold that WSDOT breached the contract as a matter of law, and in awarding WSDOT attorney's fees and costs. This Court should reverse the trial court's summary judgment order, hold that WSDOT breached the contract as a matter of law, and remand for a trial limited to determining the amount of OGJV's damages.

Dated this 21st day of August, 2017.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on August 21, 2017, I arranged for service of the foregoing Reply Brief of Appellant, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 21st day of August, 2017.

Tara Friesen

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